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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROGER BUTLER, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A. et al., Defendants and Respondents.	G050260 (Super. Ct. No. CIVVS1204115) O P I N I O N

Appeal from a judgment and orders of the Superior Court of San Bernardino County, Kirtland L. Mahlum, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part and reversed in part.

Ronald Henry Freshman for Plaintiff and Appellant.

Wright, Finlay & Zak, T. Robert Finlay, Nicholas G. Hood and Kristina M. Pelletier for Defendants and Respondents.

INTRODUCTION

In the wake of the housing crisis and the recession, homeowners have tried various measures to stave off foreclosure or, failing that, to recover something from their personal disaster. One strategy,tried by appellant Roger Butler in this case, has been a fairly consistent failure. Butler, like others before him, has tried to assert that the byzantine operations of the secondary mortgage markets insulate him from foreclosure. This is no more successful here than it has been elsewhere. Butler cannot state causes of action based on the sale of his loan against either respondent Wells Fargo Bank or respondent Mortgage Electronic Registration Systems, Inc. (MERS).

Butler, however, has two strings to his bow. In addition to alleging that respondent Wells Fargo did not own his deed of trust – and therefore had no authority to initiate foreclosure – he also alleged that when the bank took over his loan, it added charges to his monthly payments for which Butler was not liable. Wells Fargo then used these inflated charges as a pretext for foreclosing on Butler's house. This is a cause of action for wrongful foreclosure having nothing to do with credit default swaps or mortgage-backed securities. Accordingly we reverse the judgment entered in Wells Fargo's favor on this count after the trial court sustained its demurrer without leave to amend.

Butler has not alleged any facts showing involvement in wrongful foreclosure by MERS, so the judgment in its favor is affirmed.

FACTS

Butler alleged that he owned a residence in Victorville. He borrowed $150,000 to finance this property from DHI Mortgage Company, which loan was secured by a deed of trust recorded in September 2007. MERS was designated as beneficiary (as DHI's nominee), and First American Title was the trustee.

In November 2009, MERS assigned the deed of trust to Wells Fargo Bank and nominated Cal-Western Reconveyance Corporation as the new trustee to replace First American Title. Cal-Western recorded a notice of default on November 23, 2009, in the amount of $11,439, and recorded a notice of a trustee's sale on February 24, 2010. The property was sold to TDR Servicing LLC at the trustee's sale on January 3, 2011.[1]

Butler sued Wells Fargo, MERS, Cal-Western, TDR Servicing, and DHI Mortgage Company in September 2012.[2] The causes of action were labeled quiet title, wrongful foreclosure, cancelation of instruments, violation of Civil Code sections 2923.5 and 2923.6, violation of Business and Professions Code section 17200, and slander of title.

Butler's complaint alleged that DHI sold his note and deed of trust shortly after they were created in 2007 so that they could be bundled together with other "toxic loans" and sold as mortgage-backed securities to an investment loan trust. He alleged, first, that shortly after he took out his loan, his note "was sold by DHI to an unknown entity . . . and then ended up with Wells Fargo as part of an investment trust." He then alleged that Wells Fargo could not invoke the power of sales clause in the trust deed because it had no pecuniary interest in the note – this even though he had just alleged that his note was placed in an investment loan trust acquired by Wells Fargo. He further alleged that DHI was not a true lender, but rather a loan "'originator'" paid off when the loan was sold and therefore without any interest to transfer to Wells Fargo. Finally, to compound the confusion, Butler alleged his note and deed of trust never made it into an investment trust and therefore never became part of the trust res. If we credit this last

[1] The substitution of Cal-Western for American Title as trustee was dated November 13, 2009, and recorded on February 5, 2010. The deed of trust was assigned to Wells Fargo on November 17, 2009, and recorded on February 5, 2010. A substitution of trustee need not be recorded as of the date of the notice of default was recorded; it need only be executed as of that date. (Civ. Code, § 2924b, subd. (b)(4).)

[2] DHI also demurred, but before the hearing, Butler dismissed DHI.

allegation, Butler's note and deed of trust were never "securitized," "fractionalized," or "bundled," and they remain garden-variety debt instruments.

Butler then returned to his allegations his loan was sold in 2007, so MERS had no interest in it to assign to Wells Fargo in 2009, and added that the person who signed on MERS' behalf had no authority to do so. He reiterated that his note and trust deed were not deposited in an investment trust. He also disputed the substitution of trustee, on the grounds that only DHI as the lender, not MERS, could appoint a substitute trustee, and the person who signed the document was not employed by Wells Fargo or MERS and did not have the authority to sign for either of them.[3] Finally, he alleged that Cal-Western did not have the authority to notice a trustee's sale, apparently because MERS did not have the authority to substitute Cal-Western for First American Title. The entire foreclosure proceeding was therefore void, because it was carried out by entities with no interest in his trust deed.

Butler went on to allege separately he had never defaulted on his loan at all. He alleged that when Wells Fargo took over his loan in 2009, it sent him a notice in May stating there were insufficient funds in an escrow impound account to cover property taxes. Butler alleged he did not have an impound account and always paid his own taxes. Nevertheless, Wells Fargo hiked his monthly payment by nearly $1,000 in order to cover the impound account. Although it is not exactly clear, Butler appears to allege that when he did not pay this new monthly charge, Cal-Western recorded a notice of trustee's sale in February 2010. Butler alleges he was not in default at the time.

[3] Apparently Butler grounds this last allegation on the fact that the substitution was executed on November 13, 2009, but not notarized until February 2, 2010. He is under the impression that a person appearing before a notary public must sign the notarized document in the notary's presence. There is no such requirement, and the notary did not state that the document was signed in his presence. He stated that the signer "personally appeared" and established by "satisfactory evidence" that he was the person who executed the document.

Wells Fargo and MERS demurred, and the court sustained their demurrer without leave to amend. Judgment was entered in favor of Wells Fargo and MERS on January 8, 2013.

DISCUSSION

"'On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.' [Citation.]" (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) We review the complaint to determine whether it alleges facts to state a cause of action under any legal theory, regardless of the labels attached to the causes of action in the complaint itself. (*Kamen v. Lindly* (2001) 94 Cal.App.4th 197, 201.) "[W]e must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

I. Wrongful Foreclosure

Butler's wrongful foreclosure cause of action rests on two separate grounds. First, he disputes the authority of Wells Fargo, MERS, and Cal-Western to initiate the foreclosure process and carry it through. Second, and entirely unrelated, he effectively accepts Wells Fargo's status as his substitute lender, entitled to foreclose on an unpaid debt, but maintains his debt was not unpaid – he was not in default at all.

A. Foreclosure Procedure

Butler has alleged two mutually incompatible narratives as to what happened to his note and deed of trust after they were created in September 2007. First,

they were supposed to go into an investment trust, but they did not make it in time.[4] Second, they did go into an investment trust, where they were sold along with other trust deeds to whoever was incautious enough to invest in mortgage-backed securities. Therefore DHI (the original lender) had nothing to transfer to Wells Fargo, having sold the deed of trust long before 2009, when the assignment was executed.

Nonjudicial foreclosure is governed by Civil Code sections 2924 through 2924k. The procedure has three basic parts: notice of default, notice of trustee's sale, and trustee's sale. Under Civil Code section 2924, only "the trustee, mortgagee, or beneficiary, or any of their authorized agents" may file and record a notice of default in order to exercise a power of sale. The sale must then be noticed as described in Civil Code section 2924f, but not less than three months later. The notice of sale must be recorded. (Civ. Code, §§ 2924, subds. (a)(2), (a)(3); 2924f.) A person authorized to record a notice of sale includes "an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee." (Civ. Code, § 2924b, subd. (b)(4).) After the statutory time has elapsed, the trustee may sell the property. (Civ. Code, §§ 2924f, 2924g.)

If Butler's allegations regarding the failure of his note and deed of trust to become part of an investment trust are credited, then they remained what they were in 2007 – an individual note and deed of trust. DHI was the original lender, MERS was its nominee, Cal-Western was the trustee substituted for the original trustee (First American Title) and Wells Fargo was the assignee of DHI's interest in the deed of trust and the note.

Cal-Western recorded a notice of default and a notice of trustee's sale, as authorized by Civil Code sections 2924 and 2924b. The trustee's deed upon sale

[4] Nothing in the recorded documents indicates that Butler's note and deed of trust were part of an investment trust or that Wells Fargo was involved with an investment trust that included Butler's debt.

contained the customary recital regarding compliance with the requirements of mailing and posting the notices of default and sale, constituting prima facie evidence of compliance. (Civ. Code, § 2924, subd. (c).) Everything about the nonjudicial foreclosure procedure based on a deed of trust and an unpaid debt appears to be by the book.

Butler alternatively alleged that the note and deed of trust were bundled with other such instruments and sold on the secondary mortgage market. DHI as original lender had no interest in the note and therefore could not have assigned anything to Wells Fargo. These allegations have been made before – many times – and they have nearly always failed to state a cause of action.

This portion of Butler's complaint rehashes allegations regarding the operation of the secondary mortgage market that have proliferated since the housing crash. To take but one of the myriad examples, the plaintiff in *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*), based her complaint on the similar allegations of failure to properly transfer and securitize her loan as Butler makes in his complaint. "Jenkins contends Defendants do not have a secured interest in her home, despite her admitted execution of the deed of trust in 2007, because the terms of the investment trust's pooling and servicing agreement were not complied with when her loan was pooled with other home loans and securitized. More specifically, Jenkins asserts the terms of the pooling and servicing agreement were violated because (1) the promissory note was not transferred into the investment trust with a complete and unbroken chain of endorsements and transfers and (2) the trustee of the investment trust did not have actual physical possession of the note and deed of trust prior to the closing date of the investment trust." (*Id.* at p. 510.) These are exactly the allegations with which Butler supports his cause of action for wrongful foreclosure – that is, when he is not alleging that his note and deed of trust were *not* part of an investment trust.

In *Jenkins*, we held that these allegations were insufficient to state a cause of action that would, in turn, stave off foreclosure. "[E]ven if any subsequent transfers of the promissory note were invalid, Jenkins is not the victim of such invalid transfers because her obligations under the note remained unchanged. Instead, the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note." (*Jenkins, supra*, 216 Cal.App.4th at p. 515.) It is not necessary for the foreclosing party to produce the promissory note or to prove it holds the note in order to foreclose. (*Id.* at p. 513.) "Moreover, we find the statutory provisions, because they broadly authorize a 'trustee, mortgagee, or beneficiary, or *any of their authorized agents*' to initiate a nonjudicial foreclosure [citation, italics added], do not require that the foreclosing party have an actual beneficial interest in both the promissory note and deed of trust to commence and execute a nonjudicial foreclosure sale." (*Ibid.*)

Jenkins was a pre-foreclosure case. In *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*), the property had been sold at a trustee's sale. The resemblance between this case and *Fontenot* is also striking.

In *Fontenot*, the plaintiff homeowner, like Butler, alleged that MERS did not have the authority to assign her note to HSBC Bank, USA.[5] (*Fontenot, supra*, 198 Cal.App.4th at p. 269.) Therefore the bank lacked authority to foreclose. (*Id.* at p. 271.) The court rejected these claims on several grounds. "Plaintiff's cause of action ultimately seeks to demonstrate that the nonjudicial foreclosure sale was invalid because HSBC

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[5] Although the MERS system has been explained in many published opinions, we include another explanation here. "MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records." (*Fontenot, supra*, 198 Cal.App.4th at p. 267.)

Fontenot had alleged that MERS as the lender's mere nominee had no authority to assign the note, because MERS had no interest in it. The court disagreed, noting that MERS could act as an agent of the lender, which did have an interest in the note, and an allegation that MERS was a mere nominee was insufficient to establish lack of authority to assign. (*Fontenot, supra*, 198 Cal.App.4th at pp. 270-271.)

lacked authority to foreclose, never having received a proper assignment of the debt. . . . [¶] . . . [A] plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. [Citations.] Even if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by MERS's purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor." (*Id.* at pp. 271-272; see *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1507-1508; *Toneman v. United States Bank* (C.D. Cal., Feb. 23, 2013) 2013 U.S. Dist. LEXIS 84240 at *25-31 and cases cited; *Sami v. Wells Fargo Bank* (N.D. Cal., Mar. 21, 2012) 2012 U.S. Dist. LEXIS 38466 at *13-16 and cases cited.)

Irregularities in the secondary or tertiary loan markets are of no concern to the borrowing homeowners, whose loan obligations do not change. (See, e.g., *Nguyen v. Bank of Am. Nat'l Ass'n* (N.D. Cal., Nov. 15, 2011) 2011 U.S. Dist. LEXIS 131776 at *3-10, 27.) If an entity that appears from judicially-noticeable documents to have a legitimate interest in fact does not, that is a matter for the participants in the markets to sort out. (See *Jenkins, supra,* 216 Cal.App.4th at p. 515 [invalid subsequent transfers issues for transferors and transferees].)

We therefore conclude that no cause of action for wrongful foreclosure against Wells Fargo and MERS can be based on initiation and prosecution of the foreclosure process by the wrong parties. The trust deed's chain of title as evidenced by recorded documents – DHI to Wells Fargo via MERS – is unbroken, and MERS had the authority to substitute Cal-Western for First American as trustee. Butler cannot state a cause of action for wrongful foreclosure based on irregularities in the process itself.

B. Wells Fargo's Conduct before Foreclosure

Although Butler cannot complain about the mechanics of foreclosure, he has also alleged conduct that preceded it. He alleged that Wells Fargo added charges to his monthly payment for which he was not liable, then, when he did not pay these amounts, declared him in default and started the foreclosure machinery. In addition, the discrepancy between the date the trust deed was assigned to Wells Fargo (November 2009) and the date Wells Fargo began dunning Butler for mortgage payments (no later than May 2009) has not been explained.

A wrongful foreclosure claim requires allegations that "(1) the defendants caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a power of sale in a mortgage or deed of trust; (2) the plaintiff suffered prejudice or harm; and (3) the plaintiff tendered the amount of the secured indebtedness or was excused from tendering." (*Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062; see *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 800.) Proof that the trustor was not in default can satisfy the first element. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 105.) The absence of default also excuses the tender requirement. (*Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424; *Stockton v. Newman* (1957) 148 Cal.App.2d 558, 564 [tender might be construed as affirmation of debt].)

Butler has alleged that as of the time of the trustee's sale, he was not in default. Wells Fargo added unauthorized charges to his mortgage payments and used his non-payment of these charges as the basis for foreclosure. He suffered harm because he lost his property, and he was excused from tender because, according to his allegations, he was not in default.[6]

[6] Butler has alleged he was not in default for other reasons as well, for example, because DHI was paid when a trust bought his note, his obligation was therefore extinguished, and Wells Fargo had no interest in the note, so he was not in default. These allegations do not establish that Butler was not in default. By "not in default," we mean "current on his legitimate monthly payments."

Butler has stated a cause of action for wrongful foreclosure based on the allegations of an inflated demand for payment. If he can prove these allegations, he would be entitled to have the trustee's sale set aside. (See *Lona v. Citibank, N.A., supra,* 202 Cal.App.4th at pp. 104-105 [trustee's sale can be set aside if trustor not in default].) By contrast, if Wells Fargo can show he was in default when the sale took place, this cause of action fails as well. This cannot be sorted out on demurrer, and it must go back to the trial court for further proceedings, if Butler wishes to pursue this aspect of his case.

II. Other Causes of Action

Butler has stated a cause of action for wrongful foreclosure, based solely on his claim that Wells Fargo improperly charged his account. The question then becomes which of his other causes of action against Wells Fargo and MERS survive, since the trustee's sale has been completed and no allegations of fact indicate the buyer is not a bona fide purchaser.[7] The answer is none.

A. Quiet Title

Actions to quiet title are governed by Code of Civil Procedure sections 761.010 et seq. The plaintiff must plead a description of the property, the title he claims and its basis, the adverse claims of the defendant(s), and the date as of which the determination of title is sought. (Code Civ. Proc., § 761.020.) In addition, in order to go forward with a suit to quiet title in himself, Butler must do equity; he must undertake to pay what he owes on the property. (See *Shimpones v. Stickney* (1934) 219 Cal. 637, 649; see also *Urbano v. Bank of Am., N.A.* (E.D.Cal., Jan. 28, 2013) 2013 U.S. Dist. LEXIS 12001 at *28-29; *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477-478.)

[7] Butler alleged only that "[t]he current investor knows and has been warned that fraud on the title exists yet chose to continue with the transaction making him [*sic*] not a bona-fide 3rd party investor without knowledge." This conclusory allegation is insufficient to call the bona fides of the purchaser into question.

Butler has not alleged that he has tendered the amount owing under the deed of trust, a requisite to an action for quiet title. On the contrary, he alleged he did not have to tender anything. We recognize he disputes the amount Wells Fargo claims is owing, but Butler does not allege he has fully satisfied his original debt. He is not entitled to full title without tendering that amount, whatever it may be.

Butler's quiet title action against Wells Fargo and MERS is defective for another reason. According to the trustee's deed of sale, of which judicial notice may be taken, neither respondent holds title to the property. A quiet title cause of action may be stated only if the plaintiff can allege "[t]he adverse claims to the title of the plaintiff against which a determination is sought." (Code Civ. Proc., § 761.020, subd. (c).) The recorded deed establishes that neither Wells Fargo nor MERS has an adverse claim to title to the property. (See *West v. JPMorgan Chase Bank, N.A., supra,* 214 Cal.App.4th at pp. 802-803.) Butler has not stated a cause of action for quiet title against these respondents.

B. Fraud (Constructive Trust)

Constructive trust is a remedy, not a cause of action. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 277, fn. 4.) Civil Code section 2224 provides, "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." To obtain a constructive or involuntary trust, a plaintiff must plead (1) facts constituting the underlying cause of action and (2) specific property to which the defendant has title. (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1114.) Butler based his request for a constructive trust on Wells Fargo's alleged fraud.

A fraud claim requires, among other things, allegations that a plaintiff relied on a defendant's representation to his detriment. (5B. Witkin, Cal. Procedure (5th ed. 2008) § 710, p. 125.) Butler has not alleged he relied on any false statements made by either respondent to his detriment. He has alleged false statements regarding the amount of his debt made by Wells Fargo to, presumably, Cal-Western to induce it to record a notice of default. But Butler has not alleged that *he* was deceived by any false statements about this amount. "[T]he plaintiff is the person to whom the misrepresentations must have been made, and it is the plaintiff who must have relied on the misrepresentations to his damage." (*Pulver v. Avco Fin. Servs.* (1986) 182 Cal.App.3d 622, 640 [false credit reports to credit agencies not grounds for fraud claim].) Butler has thus failed to allege facts constituting the underlying cause of action.

Butler has also failed to allege property to which either respondent has title. Neither Wells Fargo nor MERS ever obtained Butler's real property. Wells Fargo had a deed of trust, and MERS did not even have that. They cannot be constructive trustees of property they do not own. Butler has failed to state a cause of action against Wells Fargo or MERS for constructive trust.

C. Cancelation of Instruments (Civil Code § 3412)

Civil Code section 3412 provides, "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." An action for cancelation of instruments differs from an action to quiet title in that the former takes aim at a specific document or piece of evidence, while the latter involves a claim asserted by a person. (*Castro v. Barry* (1889) 79 Cal. 443, 445-446.) "To state a cause of action to remove a cloud, instead of pleading in general terms that the defendant claims an adverse interest, the plaintiff must allege, inter alia, facts showing actual invalidity of the apparently valid instrument or piece of evidence." (*Wolfe v. Lipsy* (1985) 163 Cal.App.3d 633, 638.)

Butler bases his claim for cancelation of the notice of default, notice of trustee's sale, and trustee's deed upon sale on the provision of Civil Code section 2924, subdivision (a), which permits only a trustee, mortgagee, beneficiary, or an authorized agent to record a notice of default and a notice of trustee's sale. (Civ. Code, § 2924, subds. (a)(1), (a)(3).) We have already determined that Butler cannot attack the authority of MERS to appoint Cal-Western as substitute trustee and the authority of Cal-Western to record a notice of default or a notice of trustee's sale.

If Butler can prove his allegations of wrongful foreclosure, based on improper charges to his account, then of course the trustee's deed of sale will be canceled. A separate action for cancelation of this instrument is superfluous. The notice of default and the notice of trustee's sale are no longer operative, and Butler has alleged no facts to show they can "cause serious injury" to Butler if "left outstanding." They do not need to be canceled. Butler has not stated a separate claim for cancelation of instruments.

D. Violations of Civil Code sections 2923.5 and 2923.6

Civil Code section 2923.5 requires lenders to contact homeowners to explore options to avoid foreclosure before filing a notice of default. Wells Fargo's request for judicial notice included a declaration from "Wells Fargo Home Mortgage" stating that the beneficiary had complied with the statutory contact requirements. Butler has alleged that, the declaration notwithstanding, none of the defendants had contacted him as required.

Those courts that have allowed a private right of action for a violation of Civil Code section 2923.5 have restricted it to one to postpone the foreclosure sale in order to allow more time to pursue alternatives. (See *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 525-526; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1615; *Mabry v. Superior Court* (2010) 185 Cal.App.4th

208, 214.) The trustee has already foreclosed on Butler's residence. The private right of action for violation of Civil Code section 2923.5 does not extend to setting aside the trustee's sale. (*Stebley v. Litton Loan Servicing, LLP, supra,* 202 Cal.App.4th at p. 526.)

The version of Civil Code section 2923.6 in effect between 2009 and 2011 did not require a lender or beneficiary to do anything. Subdivision (b) provided, "It is the intent of the Legislature that the mortgagee, beneficiary, or authorized agent offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority."[8] As one court has stated, the statute at that time merely expressed a "hope" that lenders will offer borrowers loan modifications. (See *Mabry v. Superior Court, supra,* 185 Cal.App.4th at p. 222; see also *Hamilton v. Greenwich Investors XXVI, LLC, supra,* 195 Cal.App.4th at p. 1616.) There is no private right of action for violating this statute as it was then formulated. The demurrer to this cause of action was properly sustained.

E. Unfair, Unlawful, or Fraudulent Business Practices

Butler bases his cause of action for fraudulent business acts or practices under Business and Professions Code sections 17200 et seq. on an allegedly invalid substitution of trustee. He alleges that only DHI could effect a substitution of trustee.[9]

The cause of action is stated against One West, MTDS, LSI, and Indymac. None of these entities is named as a defendant either in the caption or in the body of the complaint. Even ignoring the introduction of a whole new slate of defendants, Butler has failed to allege any cause of action against Wells Fargo or MERS. Nothing alleged or

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[8] The statute was heavily amended in 2012, effective January 1, 2013, to impose requirements on lenders to engage in a loan modification process before recording a notice of default. (Civ. Code, § 2923.6, subds. (c)-(g).

[9] The deed of trust provides, "Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the property is located. The instrument shall contain the name of the original Lender, Trustee, and Borrower, the book and the page where the Security Instrument is recorded and the name and address of the successor trustee. Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred on the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution."

judicially noticed indicated that Wells Fargo appointed any substitute trustees. It was appointed as substitute beneficiary. If DHI improperly allowed MERS to appoint a substitute trustee, in violation of a provision of the trust deed, Butler needs to take this breach of contract up with DHI. He has not alleged any wrongdoing on the part of MERS. Furthermore, he has not alleged that he suffered any injury in fact and lost any money or property simply because MERS instead of DHI appointed a substitute trustee. (See Bus. & Prof. Code, § 17204 [only "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition" can prosecute unfair competition claim].) He has not stated a claim for unfair business practices.

F. Slander of Title

"Slander or disparagement of title occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes the owner thereof '"some special pecuniary loss or damage."' [Citation.]" (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1030.) The elements of a claim for slander of title are: (1) publication; (2) falsity; (3) absence of privilege; and (4) "'disparagement of another's land which is relied upon by a third party and which results in a pecuniary loss.' [Citation.]" (*Smith v. Commonwealth Land Title Ins. Co*. (1986) 177 Cal.App.3d 625, 630.) The "mailing, publication, and delivery of notices" required as part of the nonjudicial foreclosure process are privileged. (Civ. Code, § 2924, subd. (d)(1).) Therefore, a plaintiff must also allege that the recording was done with malice, """motivated by hatred or ill will""" or without """reasonable grounds for belief in the truth of the publication . . . ."' [Citations.]" (*Kachlon v. Markowitz* (2008)168 Cal.App.4th 316, 336.)

Ordinarily, the malice necessary to defeat a privilege claim is an affirmative defense, which the defendant would have to plead in an answer. When, however, the face of the complaint reveals a privilege, the plaintiff must plead facts establishing malice

in order to state the cause of action. "Mere allegations of malice are not sufficient [citations]; actual facts must be alleged, unless they are apparent from the statement itself." (*Tschirky v. Superior Court* (1981) 124 Cal.App.3d 534, 538-539.)

Butler based his cause of action for slander of title on recording a notice of default, a notice of trustee's sale, and a trustee's deed upon sale. He has not alleged any facts to overcome the privilege revealed on the face of the complaint, even assuming Wells Fargo was somehow involved in the recording process.[10] Because nonjudicial foreclosure is not a judicial proceeding, it is not eligible for the absolute privilege of Civil Code section 47, subdivision (b). (See *Kachlon v. Markowitz, supra*, 168 Cal.App.4th at pp. 336-341; but see *Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1518 [Civ. Code § 2924 provides absolute privilege].) Civil Code section 2924, subdivision (d)(1), however, affords a privilege to recording the notice of default, the notice of trustee's sale, and the trustee's deed upon sale. It fell to Butler, then, to allege facts showing that Wells Fargo acted with malice: "that state of mind arising from hatred or ill will." (Civ. Code, § 48a, subd. (4)(d).) Not only does Butler fail to allege any facts supporting malice, he does not allege malice even in conclusory terms. He alleged only that Wells Fargo's actions were "not privileged." He has not alleged any facts at all implicating MERS in the recordings on which he bases this claim. He has not stated a cause of action for slander of title.

III. Demurrer as to MERS

Butler has not alleged any facts implicating MERS in the inflation of his mortgage payments. From the complaint and the documents judicially noticed, it appears that MERS became involved as DHI's initial nominee and then because it appointed Cal-Western as substitute trustee and Wells Fargo as substitute beneficiary. As discussed

[10] Butler alleged only that Cal-Western was acting as Wells Fargo's "agent" in this cause of action. Cal-Western recorded the notice of default, First American as Cal-Western's agent recorded the notice of trustee's sale, and First American Title Company recorded the trustee's deed upon sale.

above, no claim for wrongful conduct can be based on these facts. Accordingly, the demurrer was properly sustained as to MERS.

DISPOSITION

The judgment is reversed. The order sustaining respondents' demurrers to all causes of action except wrongful foreclosure against Wells Fargo is affirmed. The order sustaining respondent Wells Fargo's demurrer to the cause of action for wrongful foreclosure on the ground of inflating Butler's mortgage payments is reversed. The parties are to bear their own costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.